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Supreme Court of the United States

OCTOBER TERM, 1940

No. 610

J. TOM WATSON (GIBBS), individually and as Attorney General
of the State of Florida, *et al.*,

Appellants,

vs.

GENE BUCK, individually and as President of the American
Society of Composers, Authors and Publishers, *et al.*,

No. 611

GENE BUCK, individually and as President of the American
Society of Composers, Authors and Publishers, *et al.*,

Appellants,

vs.

J. TOM WATSON (GIBBS), individually and as Attorney General
of the State of Florida, *et al.*,

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF FLORIDA.

**REPLY BRIEF OF APPELLEES IN NO. 610, AND
APPELLANTS IN NO. 611.**

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April, 1941.

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REPLY BRIEF OF APPELLEES IN CASE NO. 610, AND APPELLANTS IN CASE NO. 611 (Plaintiffs Below).*

Defendants rely upon two propositions:

1. That, regardless of the extent to which the State Statutes may invade plaintiffs' constitutional rights, plaintiffs may not be heard to complain because they are allegedly violating the Sherman Act;

*Italics throughout this brief are ours.

2. That, although one of the purposes of the State Statutes was admittedly bad, to wit: "to allow users of copyrighted music for profit under certain specified conditions to use music without payment for it" (Def. Br. p. 36), the Statutes had another purpose, namely, "to make unlawful and prohibit the operation in this State of price-fixing combinations dealing in copyrighted music" (Def. Br. p. 36). Defendants state that the latter purpose was the "fundamental" one, and that "if the 'without pay' sections are stricken, we have a complete workable anti-monopoly statute independent of the other sections remaining . . ." (Def. Br. p. 36).

**I. The Defense of Unclean Hands is Without Merit.
(Answering Point I of Defendants' Brief.)**

Point I of defendants' brief charges that plaintiffs are engaged in violating the Sherman Act and therefore, should be barred from any relief in equity.

In our main brief we showed that plaintiffs were not engaged in violating the Sherman Act, but that even if they were, they would be entitled to equitable relief against the deprivation of their constitutional rights by statutes such as those at bar (Pltf. Br. pp. 90-92). It was demonstrated that the statutes were of the same nature as in the case of *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, where this Court granted equitable relief against enforcement of such a statute (Pltf. Br. pp. 68-71). It is perfectly clear from the part of the opinion quoted on page 68 of our main brief that this Court rejected the proposition that one has "no standing in equity" to challenge the validity under the Federal Constitution of a state statute allegedly made necessary by "plaintiff's conduct". It should be further noted that in the synopsis of the arguments in the report of the *McFarland* case the point that the plaintiff could not be afforded relief in equity because of unclean

hands based on an alleged monopoly was made by the State, and specifically denied by the plaintiff as applicable to a case where one asks "relief from the enforcement of an unconstitutional statute". It should also be noted that when the instant case was before this Court on the appeal from the preliminary injunction, defendants urged that the bill should not be maintained because of the same alleged unclean hands as now relied upon (Appellants' Br. p. 49, Case # 276, October Term 1938).

Defendants rely upon the decision in *Buck v. Gallagher*, 36 F. Supp. 405 (W. D. Wash., 1940) to support the defense of unclean hands. That decision was commented on in our main brief in a footnote at page 77. An appeal to this Court from that decision was filed on April 15, 1941, after a motion for a new trial was denied on that day. The decision of the Washington District Court is manifestly contrary to the decisions of this Court in *McFarland v. American Sugar Refining Co.*, 241 U. S. 79.

The decision of the District Court in the *Gallagher* case is criticized in a carefully prepared comment entitled "*The Sherman Act As a Clean Hands Defense*," 50 Yale L. J. 1114 (April, 1941).

Although defendants devote a substantial part of their brief in an effort to prove that the Society has violated the Sherman Act, we might well rest our answer on the proposition of law laid down by this Court in the *McFarland* case and the lower court decisions referred to in our main brief (p. 92). However, we have determined to discuss briefly the various facts relied upon to support the defendants' position (Def. Br. pp. 9-28).

(a) They state that prior to 1937 there existed in Florida "a deplorable situation affecting the users of copyrighted music" (p. 9). The record is barren of any such evidence. On the contrary the uncontradicted evidence is that large industries had been built up in Florida which catered to public entertainment—hotels, motion-

picture theatres, dance-halls, taverns and radio broadcasters. An integral underlying factor in the operation of these industries has been the use of copyrighted music in public performance for profit. Vast sums of money are collected annually from the public in Florida by these industries.

In 1935 these industries had the following revenues (Pltf. Dep. Ex. 52, 53, 54; R. I, 444-5, R. II, 1057):

10 Broadcasting Stations	\$ 580,000
1173 Hotels	21,761,000
383 Theatres, tracks, dance-halls, skating rinks, and miscellaneous establish- ments	10,902,000
Total	<hr/> \$33,243,000

All of these Florida industries *combined* paid the Society a total gross revenue that year of \$47,481.24 for the raw material so necessary to their operations (Pltf. Dep. Ex. 39, R. I, 419, R. II, 1039).

(b) Defendants argue that the users were forced to buy all or none of the music, i. e., take a blanket license, and "could not deal directly with any separate copyright owner" (Def. Br. p. 9). But the testimony showed that when they dealt "directly" with any separate copyright owner, he was at their complete mercy; and as a rule they never even bothered to deal with him, but helped themselves to his works without compensation (R. II, 756-61; 850-1; R. I, 242-3, 274, 305, 365, 386-7, 441, 594).

Defendants' witness L. S. Mitchell, the owner of a radio broadcasting station in Florida, who had the so-called newspaper contract under which he paid the Society only for those programs on which music in the Society's repertoire was used (R. I, 582-6), had every incentive to eliminate the Society's music from his radio programs and thus avoid payment to the Society. Nevertheless the only other license that he had was one with SESAC (Society of

European Stage Authors and Composers [R. I, 583]). He could not even state (in answer to a question by defendants' counsel) whether it would be profitable or favorable to negotiate and arrange for the use of musical compositions with individual holders of copyrighted music based on what is called a "per use" or "per piece" basis (R. I, 585).

Defendants' witness Malec, who operated a large dance-hall making substantial use of music (R. II, 836), testified that he exercised "no power over the music that the orchestra brings along when they play their engagements" (R. II, 840). He gave the orchestra leader carte blanche and told him to go ahead and play what he wanted without keeping any log or record of the pieces played; he merely told the orchestra leader the tempo of the music but left it to his discretion what kind of music he would play (R. II, 849-50). For three months he had no license from the Society or from anyone else, yet he continued to perform publicly for profit the compositions in the repertoire of the Society without paying anything either to the Society or to any individual composer, author or publisher, whether a member of the Society or not (R. II, 850-1). He never made any effort to find out who owned the particular music played in his establishment, or to pay any author, composer or publisher a license fee for the use of such music (R. II, 851).

The record is replete with evidence that the only objection of the users to the Society is that it serves effectively to protect the interests of composers, authors and publishers against wilful infringement. The desire of the proponents of the State Statutes to do away with the Society is apparent from the following question which defendants' counsel asked Dr. Sigmund Spaeth, one of the members of the Society (R. II, 661):

"Q. If the public performance rights will be included in the sales price and the sales price were

arranged by yourself and your publisher high enough to cover a substantial and reasonable income for yourself, then you would have no necessity of an organization such as ASCAP!"

No method of licensing other than that adopted by the Society has ever been devised, whether by the Society or anyone else. The manager of the National Association of Broadcasters admitted that the broadcasters were never able to devise any other system, or at least they never submitted any such plan to the Society or anyone else during all of the years of their negotiations (R. I, 573-4). As will be pointed out hereinafter, the United States Government has recognized the propriety and legality of the Society's operations, after certain changes which the Society agreed to and which do not affect this case.

(c) There is no evidence to support the defendants' assertion that users "may have had no desire to use the music of more than one copyright owner, and not all of that" (Def. Br. p. 10). On the contrary the evidence is that users such as dance-halls and broadcasters required many and varied numbers—dance-halls, between one and two hundred compositions a week (R. II, 852-3), and broadcasters, between two hundred fifty and six hundred per day (R. I, 499-500), and that there was no attempt made to check on the compositions being performed, or to ascertain their copyright status or to obtain a license; nor was any record kept of the compositions actually performed, regardless of whether or not the user had the Society's license (R. II, 810, 812, 818, 849-51, 890, R. I, 523, 593).

Motion-picture theatres exhibit and perform all numbers which are on the sound track of a film, and they rely upon the Society's license for protection against infringement (R. II, 818-19).

(d) There is no evidence that the Society ever exercised any "vicious restraints" (Def. Br. p. 10). Its rates have

always been reasonable and moderate; and there is not a scintilla of evidence that *any user in the United States* was ever forced out of business or injured by any fees that he paid to the Society.

(e) Defendants stress the terms "price-fixing combination" (Def. Br. p. 11), "declared purpose of fixing prices" (Def. Br. p. 11), "power to dominate and fix prices" (Def. Br. p. 12) and "license fee fixed and determined" (p. 13) as if the record contained evidence to support these charges.*

-On the contrary, the record clearly and unequivocally shows that the Society always negotiated for its fees with its licensees (most of whom acted in groups or users associations [R. II, 759]) and that the fees paid to the Society were agreed upon in open (and often protracted) negotiations. There is no evidence that arbitrary rates were sought, or imposed.

E. C. Mills, formerly general manager of the Society, described the negotiations with the motion-picture theatre owners since 1920, the latter always acting as a group. After the terms were agreed upon and recommended by the theatre associations *to their own members*, individual contracts were made with each theatre (R. I., 488-9).

The same procedure was followed in negotiating with broadcasters. Mills testified on cross-examination (R. I., 513):

"A. * * * The prices and terms upon which they [compositions in the Society's repertoire] are used are fixed as the *result of negotiations* with committees authorized to act as between the management of the Society and the Committees, then, the manage-

* Defendants quote plaintiffs' bill as alleging that the blanket license fee is "fixed and determined" by the Society (Def. Br. p. 13). Had they quoted the *entire* clause of that sentence it would read "fixed and determined by the Society *in negotiations with the respective users*" (R. I., 20).

ment of the Society goes to the Board of Directors for approval of the formula and rate which has been set up.

Q. The board is the agency as between the copyright members and the users, or associations of users, with whom negotiations are conducted—they approve the prices for the copyright members of the Society?

A. *After those prices have been negotiated with the Committees representing the users."*

Gene Buck testified (R. II, 795):

"Q. The prices charged for the public performance rights in the State of Nebraska are fixed by your Board of Directors?

A. No, no. Let us get that straight. The prices as charged in the State of Nebraska—we sat down and negotiated, sir, so that we get the whole picture.

Q. Please answer my question.

A. I want to answer the question. You say we fixed it—we did not fix it. We negotiated with the National Association of Broadcasters who fixed it, and we sat down with the *Hotel Owners Association* and fixed it, and sat down with the *Motion Picture Operators* of the State of Nebraska and fixed it. I want that record clear. There was a period of negotiations. It was not fixed by any individual writer or board of directors of the American Society. It was fixed by negotiation."

These witnesses were corroborated by defendants' witness, J. W. Baldwin, former managing director of the National Association of Broadcasters, who described the negotiations that had taken place from time to time between his group and the Society, and who said that the main dissatisfaction of his group was *not* with the price, but with the blanket license (R. I., 568-9; 575). Although the witness claimed that the prices and terms were fixed

by the Society (R. I, 570), his testimony clearly showed long series of negotiations with the Broadcasters' Association extending back over the years (R. I, 567-75).

Baldwin admitted that he did not want to see the Society destroyed, because some central agency, whether it was the Society or some other, was necessary (R. I, 571-2). His group had never presented a per piece plan or formula to the Society (R. I, 573) and while they negotiated such a plan with the Warner Brothers (after the latter had withdrawn from the Society), they could not work it out (R. I, 574).

(f) Defendants argue that the contracts between the Society and newspaper-owned broadcasters were discriminatory as against commercial broadcasters (Def. Br. p. 16). This was answered in our main brief (p. 90, footnote). Mills' explanation of these contracts is uncontradicted (R. I, 595-6):

"A. There was a long series of negotiations between a committee representing ASCAP and a committee representing the National Association of Broadcasters. As a result of those conferences a formula for commercially operated stations was devised and a contract was drawn up under that formula. The formula was approved by the National Association of Broadcasters and the Society. After it had been approved within a week or so a committee called on us representing the so-called newspaper owned broadcasting stations of which there were at that time some fifty-five, according to my recollection. This was in 1932. They represented to us that the newspapers, throughout the country, devoted a great deal of white space to the furtherance of the cause of music, and that they ought to have some sort of special consideration from the composers and authors of music, because of the added interest in music through them. They wanted to negotiate a special agreement adapted to their particular needs—they didn't operate commercial

stations in those days; their chief function at that time was the distribution of weather and crop reports, financial reports and so forth. They seemed to make a good case and we listened to them. Then, we consulted the executives of the National Association of Broadcasters, who had approved the other agreement, and we asked them if they had any objections to our dealing with these newspaper owned stations and they said, no, and these negotiations resulted in a different form of contract—the so-called newspaper owned station contracts. It was adopted and each newspaper in the United States was offered the option of the commercial contract or the newspaper owned contract, and the best evidence of the fact that it is not as advantageous as may seem when compared to the other contract is that of the fifty-five newspaper owned stations at that time only fifteen elected to take that contract. It had certain stipulations that more than balance its advantages. It was submitted to the National Association of Broadcasters and approved by that association before we agreed to make that newspaper contract * * *

Q. Were these negotiations had again in 1935 with the newspaper owned stations?

A. No, sir, with the National Association of Broadcasters only.

Q. Did you inform the NAB then that you were renewing the newspaper contracts?

A. Yes, sir.

Q. It was done with their full knowledge?

A. Yes, sir."

He pointed out that the newspaper contract called for a minimum guaranty (R. I, 598-9), a factor not present in the commercial contract.

(g) Defendants attempt to fasten upon the Society a restraint upon commerce in sheet music citing the experience of Warner Bros. Picture Corp. (Def. Br. pp. 19-20). The

uncontradicted testimony, however, is that the Society does not publish or in any wise deal in sheet music (R. II, 769, 670; R. I, 523). The fact that the sheet music sales of the Warner Brothers publishers fell off during the period of their withdrawal from the Society was due to a number of causes, not the least of which was the boycotting of their works in the same manner as the radio networks are today boycotting all works of all members of the Society. The power of radio broadcasters to conduct such a boycott was fully exposed by the Federal Communications Commission in the Report of June 12, 1940 filed by its Committee to Supervise the Investigation of Chain Broadcasting (Commission Order No. 37—Docket No. 5060—see Memorandum of Submittal, pp. i-vi; ch. III entitled "Broadcasting and the Supply of Talent", pp. 101-7; "Transcription Services and the Broadcasting Industry", pp. 108-14, and the Conclusions of the Committee, pp. 133-8).

In any event, the record in the case at bar does not justify any inference that the Society was responsible for the decline in sales of sheet music of the Warner group. So serious a charge should be supported by evidence rather than mere speculation.

The most eloquent indication of the reason for the failure of Warner Bros. to succeed as an independent agency is the testimony of Mr. Malec in answer to a question put by the Court, that when Warner Bros. quoted a license fee "we just ignored the letter, and there was nothing more heard by us from Warner Bros." (R. II, 842). If the other 32,000 establishments using music commercially did likewise it can readily be seen that Warner Bros. would lose all incentive to invest in the publication of new music. The testimony of Dr. Spaeth on cross-examination shows that Warner Bros. were confronted with that very situation (R. II, 661-2):

"Q. You don't suppose those people would cease to use music simply because the public performance price was put on the music?

"A. I can answer that question in this way; I believe that they would automatically cease to use it because they couldn't afford to pay the price which the publisher would want; and the case was very clearly proved when the Warner Brothers with their publishers ceased; rather than pay the prices that Warner expected them to pay, they said, 'We would rather not use your music,' and no Warner music was used during that entire period; *the entire time that Warner was outside the ASCAP the music of Warner was boycotted by the radio stations and all others using music.*

"Mr. Hotz: I move to strike out the entire answer as not responsive.

"Q. Warner Brothers were assuming a similar position to music that ASCAP did?

"A. Yes.

"Q. And it became necessary for users of music to have two licenses if they wished to be free from infringement?

"A. They didn't have to have two licenses, if they wanted to substitute the Warner license for the ASCAP license. I have heard of no cases where anyone chose the Warner license in place of the ASCAP license. In most cases I found that the user simply refused to deal with Warner. The only exceptions were certain small stations. Warner licenses were so much higher than the comparatively small charge by ASCAP. Users of music in general refused to do business with any such concern like that which controlled large publishers and several motion picture houses and controlled one of the large motion picture companies."

(h) Defendants claim that the Society's publisher-members obtain control of many compositions by the requirement that five compositions of writers must be published through members of the Society before they are admitted.

This apparently is intended to show a restraint of interstate commerce. But the United States Government seeks to increase membership in the Society. Consequently the consent decree lowers the requirement to one composition (Appendix "B", Art. II, par. 11).

Defendants point out that the number of composer and author members in the Society has increased from 1,000 in 1937 to 1,477 in 1939 and that the publisher-members increased from 123 to 131 in the same period (Def. Br. p. 11). This increase indicates that 477 composers and authors, and eight publishers, to whom no payments had been made by users for public performances of copyrighted works for profit prior to 1937 (the evidence showing conclusively that no such fees were paid by the bulk of the users to the unorganized composers, authors and publishers [R. I, 242-3, 274, 305, 365, 386-7, 441, 594; R. II, 756-61, 850-1]), will share in such royalties hereafter. The addition of new members does not increase the cost to the users under a blanket license; it merely decreases the aliquot share of royalties received by those who were theretofore members of the Society. The number of members is bound to increase much more rapidly in the future in view of the position taken by the Government that *interstate commerce will be promoted by increasing rather than decreasing the number of members in the Society*. It is quite obvious that the Society will admit more composer- and author-members on the basis of one composition making them eligible than on the basis of five compositions.

It can hardly be urged that the Society constitutes a monopoly or a combination in restraint of trade. On the contrary, it supplies the only medium ever devised for the licensing of performing rights through an effective agency operated jointly by the creators and the copyright owners.

(i) The suit in equity brought by the Government in the Southern District of New York against the Society in 1934 to which defendants refer (Def. Br. p. 10), was discon-

tinued on March 4, 1941 (a copy of the order of discontinuance is annexed hereto as Appendix "A"). In a new action thereupon filed in the same district, the Society on March 4, 1941, entered into the consent decree mentioned above (Appendix "B"). This decree establishes that the Government is satisfied that the Society is operating in a lawful manner.

(j) The charge that the Society is an association of publishers, with authors as "window-dressing" (Def. Br. p. 18) is wholly unsupported. On the contrary, the protection which the Society affords to the composer and author against the exploitation of the users has been overwhelmingly established. This is true to such an extent that the consent decree permits the Society to protect its members against the broadcasters "by prohibiting the members from granting or assigning to persons, firms, corporations or enterprises, including Broadcast Music, Inc.,* the right to license or assign to others the right to perform publicly for profit the respective copyrighted musical compositions of which performance rights are owned or controlled by the respective members of the Society" (Appendix "B", Art. II, Par. (1), subd. "e").

The 1939 Act would allow users to obtain licenses from the "copyright owner" alone (Section 4-A). This deliberately ignores the composer and author. The United States Government recognizes the extent to which the Society protects the composer and author, and consequently the consent decree permits the Society to prevent users from obtaining licenses of performing rights from members of the Society unless the consent of the *composers and authors* as well as the publishers, is obtained; in order to insure the bargaining position of the composers and authors, the

*Broadcast Music Inc. was organized by the radio broadcasters as a source of music supply controlled by them to compete with the Society (R. I, 531-2, R. II, 902-4).

Society must be apprised in advance of the intention of its members to issue such licenses (Appendix "B", Art. II, par. (1), subds. "b" and "d").

It has always been customary for the author to give the publisher the right to secure copyright (R. II, 798). Since the organization of the Society, however, the funds received from licensing the right of public performance for profit have been divided *equally* between the publishers on one hand and the authors and composers on the other hand (R. II, 794), and the authors and composers have an equal voice with the publishers in the management and operation of the Society (R. I, 53). *This is uncontradicted.*

The present standard form of contract between composers and publishers, as approved by the Songwriters Protective Association (an association of composers and authors) is Defendants' Dep. Exhibits "A" and "B" (R. II, 1072A-1078, R. I, 213, 397). This may be compared with an earlier standard form of agreement made in 1932 (Pltf. Dep. Ex. 7, R. II, 990A, R. I, 396), which was the first contract between publisher and author recognizing the latter's right of collective bargaining through the Songwriters Protective Association.

Defendants' witnesses would ignore the composers and authors in acquiring performing rights. They would secure them solely from the *publishers* on the theory that they are the copyright owners (R. II, 904-5). The notion that these rights are owned solely by the publishers is advanced in defendants' brief (Def. Br. pp. 11-12), as well as in Section 4-A of the 1939 Act.

(k) Defendants submit figures attempting to show that a great many copyrights are embraced in the Society's repertoire. That is necessarily true. The cooperative and non-profit nature of its operation attracts many of the most renowned composers, authors and publishers in the world. Their strength enables the Society to protect the less powerful and less prominent members—particularly the young

composer and author who would be at the users' mercy were it not for the Society.

The Society is akin to a labor union.* It seeks to protect its members in a situation where they would be helpless without collective action. It is unique in that capital (the publishers) has a fifty percent. interest in this cooperative enterprise. Thus the rights of all are protected. The United States Government recognizes the need for *increasing*, rather than *decreasing*, the membership of the Society, as will be shown in discussing the consent decree. There can be no economic dislocation resulting from "jurisdictional disputes" so long as membership in the Society is open to all meritorious composers and authors. This is now assured by the consent decree.

II. The several provisions of the 1937 Act and the 1939 Act are not separable. Both Acts are invalid in their entirety.

A. Answering Point II of Defendants' Brief.

Defendants urge in their Point II that Sections 2-A, 2-B and 6 of the 1937 Act are separable; that they were allegedly repealed by the 1939 Act; that defendants have no duties to perform in regard to those sections; and that their provisions are independent of the alleged anti-monopoly provisions. Defendants also urge that Sections 4-A, 4-B, 5-A and 5-B of the 1937 Act "are merely subordinate and supplementary to Section 1," and, therefore, separable from the other provisions of the Act (Def. Br. p. 7).

(1). We showed in our main brief that Sections 2-A, 2-B and 6 of the 1937 Act were not repealed by the 1939 Act

* It has recently been held in several cases that labor unions acting within their appropriate scope, are not subject to the provisions of the Sherman Act. *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940); *United States v. Hutcheson*, 61 Sup. Ct. 463 (1941).

(Pl. Br. p. 36). On the contrary, the Florida legislature in 1939 removed all doubt as to its intention respecting those sections. The 1939 Act was introduced in the Florida legislature on May 8, 1939 as House Bill 1103 and Senate Bill 635 (Supp. Compl. R. I, 112; admitted, R. I, 185). The sponsors of that bill simultaneously introduced a companion bill designated as House Bill No. 1110; Senate Bill No. 636 (Supp. Compl. par. 15(a), R. I, 118; admitted, R. I, 186). The latter bill provided for the amendment of the 1937 Act by eliminating Sections 2-A, 2-B and 6, and amending Section 8 by reducing the minimum prison sentence from one year to ninety days (R. I, 139-41). Prior to that time the defendants had argued in this Court that they had no duties to perform under Sections 2-A, 2-B and 6 and that those sections were separable (Appellants' Brief on previous appeal in this case, pp. 8-9, 56-62). This Court, however, affirmed an interlocutory injunction against the entire Act on April 17, 1939. *Gibbs v. Buck*, 307 U. S. 66.

Both bills in question were obviously introduced as an answer to the decision of this Court. But the bill seeking to repeal Sections 2-A, 2-B and 6, and to amend Section 8 of the 1937 Act failed of passage (Supp. Compl., par. 15(b), R. I, 118; admitted, R. I, 186). The legislature thereby indicated, first, that it was *opposed* to the repeal or amendment of those sections; and secondly, that Sections 2-A, 2-B and 6 were an integral part of the 1937 Act and should not be excised from it. Defendants now call upon this Court to amend an act of the Florida legislature in a manner which the legislature itself has already rejected. That, we submit, would trespass upon a field reserved to the state legislature.

(2) The defendants' duties in respect of Sections 2-A, 2-B and 6 are clear. In asserting that they have no duties to perform as to these sections, defendants ignore the provisions of Section 8 of the 1937 Act, as well as the express refusal of the legislature to repeal those sections. Section

8 imposes heavy fines and imprisonment on any combination and "any *other* person, firm or corporation acting or attempting to act * * * in violation of the terms of this Act." Thus if any person, firm or corporation *other than a combination condemned in Section 1* should violate any section of the Act, he is subject to the penalties imposed in Section 8. Such person is made guilty of a felony. Who is supposed to prosecute and impose the penalties for such felonies?

If plaintiffs fail to comply with the requirements of Sections 2-A, 2-B and 6 and attempt to enforce their rights in a manner prohibited by these sections, they will have violated the terms of the 1937 Act contained in those sections. For example, if the copies of musical compositions sold by plaintiffs in Florida should be sold at a price which includes only the right of private use or public non-profit uses, and if plaintiffs should thereafter attempt to treat as an infringement the unauthorized public performances for profit given by the purchaser of such sheet of music in the State of Florida, plaintiffs will have violated Sections 2-A and 2-B and will be subject to all the penalties contained in Section 8, regardless of whether or not they are a combination condemned in Section 1. The duty to prosecute them will obviously rest upon these defendants. They are the law enforcement officers in the State, and admit that they will perform "all duties imposed upon them" (R. I, 187).

Likewise, if plaintiffs should sue a Florida broadcasting station or motion picture theatre for infringement, loss or damage in the State of Florida by reason of re-broadcasting a musical composition emanating from outside the State (or if the performers come into the State from without the State), they will violate Section 6 of the Act and will likewise be subject to the penalties contained in Section 8.

The duty of defendants to enforce these sections by invoking the criminal provisions of Section 8 is clear.

(3) Sections 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6 of the 1937 Act are not separable from the other provisions of the 1937 Act. We have already discussed Sections 2-A, 2-B and 6. Sections 4-A, 4-B, 5-A and 5-B are analyzed at pages 31-3, 46-7, 56-7, 58, 59, 65-6 and 85-6 of plaintiffs' main brief.

In commenting upon these sections, Judge HUTCHESON, speaking for the court below, said (34 F. Supp. 510, 516; R. II, 1099-1100):

"Defendants concede the invalidity of Sections 2-A, 2-B and 6. Indeed at one stage of the proceedings before us they offered to submit to a permanent injunction as to them. They insist, however, that the vice of these sections is peculiar and confined to them and does not pervade the Act, and that because this is so and particularly because the Act contains a separability clause, Sec. 12, and because, in the reference in the 1939 Act to sections of the 1937 Act as unrepealed, these sections were not included, these invalid sections should, by a kind of judicial surgery, be excised from the Act, leaving it to stand in its other provisions as an anti-monopoly statute."

In discussing the possible separability of the various sections of the Statute, the court below said (R. 1100-1):

"But, law making at last, is a legislative and not a judicial function and the search of the Court in the end is not for a law the legislature could or might have validly enacted but for the valid law it did enact. When, therefore, the vice of a statute runs through the whole of it, Courts may not, by lopping and paring away, create a statute which the structure and context of the Act as a whole shows the legislature did not intend to, indeed did not, enact. *Williams v. Standard Oil Co.*, 278 U. S. 235, 241, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596; *Sage v. Baldwin*, D. C., 55 F. 2nd 968, and cited cases.

*Looked at in this light when the whole purpose of the 1937 Act to outlaw ASCAP and its contracts and to permit users in Florida to perform compositions, dealt with in them, without pay, is kept in mind, we think it clear that the Act, in spite of its separability provision, is so far indivisible that with all the 'without pay' sections stricken as invalid, the whole Act must fall. For, it may not be supposed that the legislature intended to strike down the contracts and leave both ASCAP and its members, and the users in Florida who had been dealing with ASCAP, up in the air, with contracts already entered into and a considerable part of the compensation already paid, with no right in ASCAP or its members to collect the balance due, and none in the Florida users, without paying again under separate arrangements, to use the music they had contracted and partly paid for. We, therefore, conclude as the Court did in *Buck v. Swanson*, supra, that the whole Act is invalid and must fall."*

The court then pointed out that the legislature itself by passing the 1939 Act had expressly provided that existing Florida laws pertaining to monopoly or restraint of trade "including . . . Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14" of the 1937 Act should not be repealed by anything contained in the 1939 Act. The court below said that the Florida legislature "by grouping all of these sections together makes it clear that they are regarded by the legislature as forming a harmonious whole and not as isolated and independent separate laws and as a whole, they must stand or fall together" (R. II, 1101).

B. Answering Point III of Defendants' Brief.

In Point III of their brief, defendants admit that Sections 3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9 of the 1937 Act are invalid if Section 1 is invalid (Def. Br., p. 39). Defend-

ants urge that Section 1 of the 1937 Act is lawful because its alleged purpose is to make price-fixing combinations unlawful.

In the court below, defendants cited the recent case of *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, in support of the proposition that price-fixing is *per se* illegal. In that case, this Court held that an agreement to fix prices of a commodity flowing in the channels of interstate commerce is *per se* an illegal restraint of trade.

The 1937 Act does not purport to deal with fixing prices of commodities. No commodities are involved here. Nor are the plaintiffs engaged in fixing any such prices. Defendants quote a part of the following allegation of the bill of complaint:

"The license fees in all these cases are fixed and determined by the Society on behalf of all its members after negotiations with either the trade association or the individual user."

The defendants claim that this amounts to "price-fixing."

It has been conclusively shown that the right to perform a single musical composition is worthless unless a vast number of other compositions is included and a blanket license is given for the right to perform those works. It is obvious that a blanket license cannot be given unless the owners of the rights on the one hand, and the users on the other, agree upon the price. The plaintiff Society, like all other organizations, acts through a Board of Directors and in negotiations with users, the Board of Directors of the Society acts on behalf of all its members.

If the agreement which results from negotiations between the Board or its representatives and users constitutes price fixing, then all agreements between owners of a number of copyrighted musical compositions in which such owners fix a price for the right to perform their works, constitute price fixing. "Price fixing" in the odious sense in which it is

used in enforcement of the anti-trust laws, is illegal and in restraint of trade, whether done by one or by many. The 1937 Act permits individuals or corporations to swallow up all the copyrights in the United States for the purpose of determining or fixing license fees for the use or rendition of their copyrighted musical compositions, provided those individuals or corporations do not constitute "a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions." In other words, if the thousand members of the Society and the 45,000 members of affiliated foreign societies sold all their copyrights outright to one corporation such as the Broadcast Music, Inc. (the creature of the broadcasting companies) or to one of the foreign licensing agencies such as the Society of European Stage Authors and Composers (SESAC) or Associated Music Publishers, or G. Ricordi of Milan, the purchasers would be exempt from the operation of this statute because they would not constitute a substantial number of the persons within the United States who own copyrights in musical compositions.

The willingness of the State of Florida to permit the acquisition of a large body of copyrights by a single corporation and to permit them to issue licenses at fees fixed and determined by such corporation while it denies that right to cooperative associations such as the Society, shows clearly that the evil aimed at is not the alleged price fixing but rather the licensing through a cooperative association.

Price fixing consists of fixing the price at which a certain commodity is sold. A gallon of oil is the same no matter who sells it, and if anyone in combination with others and by whatever means, fixes the price at which a gallon of oil shall sell in the market, he is guilty of restraining trade. But musical compositions are not gallons of oil. Every musical composition is different. As the evidence shows, there cannot in any real sense, be competition between

musical compositions. The price fixed for the performance of one musical composition or one group of musical compositions cannot affect the price charged for other musical compositions or other groups of them. There is no proof in this record, and indeed there could be none, that the charges made by the Society for licensing its own works in any wise affected the charges made by others for licensing other works. The license fees charged by SESAC, Associated, G. Ricordi of Milan, and other licensing agencies have not in any wise been influenced or affected by the Society. There is no evidence that the fees charged by one bear any relation to the fees charged by any other. Thus there has been no price fixing in the sense of the *Socony Vacuum* case nor does the statute condemn the type of price fixing referred to in that case.

C. Answering Point IV of Defendants' Brief.

Defendants urge that Section 4-A of the 1939 Act constitutes a valid regulation of price fixing combinations.

Section 4-A of the 1939 Act is discussed at pages 39, 47-8 and 59-60 of our main brief. It bars two or more owners of copyrighted musical compositions from issuing blanket licenses for joint works unless all their compositions are severally made available to each user of the State at a price fixed in advance for each performance, by each separate copyright owner acting independently. Defendants urge that this is a statute aimed against price fixing. As pointed out by the court below, however (Appendix, p. 48; R. II, 1102),

“Section 4-A does not concern itself with price fixing or with combinations for price fixing; it deals only with the act of pooling copyrighted pieces to sell them for one royalty, that is, with the selling of two or more pieces under one license.”

What the statute *does* do, as pointed out by the court below, is to restrict the rights of copyright owners as to how they will license others to use their copyrighted musical compositions. It seeks to prevent them from adopting a scheme of licensing, which is the only practical one yet devised to enable them to reap any reward for their work. As further said by the court below (Appendix, p. 47; R. II, 1102):

"A copyright owner has a right to sell or withhold from sale the matter of and the rights under the copyright. He cannot be made to sell his product unless he wishes to. He can make one price to one user and an entirely different price to another. The effort of this section is to compel copyright owners, if they sell to one by a blanket license, to furnish schedules giving prices of the compositions so licensed, and to permit anyone desiring to do so, to perform any piece at the price so fixed. This is a taking of plaintiffs' property in its copyright without due process, and is beyond the power of the state."

This is the thought expressed by this Court as to property generally in *Smiley v. Kansas*, 196 U. S. 447, 456 (relied upon by defendant in support of Section 4-C):

"Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom parties may seek to further their business interests, * * *."

The Act shows on its face that it was not enacted to regulate price fixing combinations. It manifestly abridges the rights given by the copyright statutes to a copyright owner and the ordinary "freedom of contract" which is protected by the Federal Constitution. Section 4-A was passed to circumvent the provisions of Section 25 of the Copyright Act, which subjects an infringer to minimum damages of \$250. That section of the Copyright Act has been before

this Court on many occasions. *Douglas v. Cunningham*, 294 U. S. 207 (1935); *Jewell-LaSalle R. Co. v. Buck*, 283 U. S. 202 (1931); *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100 (1919); *Brady v. Daly*, 175 U. S. 148 (1899).

Under Section 4-A of the 1939 Act, if any infringement is apprehended, the user will exercise the option granted by the Statute and will tender payment of the few cents fixed as a license fee for a single performance. This would entirely circumvent the policy of the Copyright Law as defined in the above decisions of this Court. Moreover, sight must not be lost of the fact that the evidence establishes that there is *no competition between musical compositions*.

D. Answering Point V of Defendants' Brief.

There is little to add to what the court below said as to Section 4-C of the 1939 Act.

Defendants attempt to sustain this section on the ground that the public entertainment business is affected with the public interest and therefore subject to regulation and that "the right to charge for use of a copyright or patent * * * does not embrace a right to compensation for the use of *other* than the protected work or invention" (Def. Br. 53).

Defendants rely upon *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436. As we pointed out in our main brief (p. 82), that case involved an *actual* restraint of trade in fixing the prices of *non-patented* articles moving in interstate commerce. No attempt is made by the plaintiffs in their blanket licenses—and it is those that Section 4-C as well as Section 4-A are aimed at—to extend the monopoly which they have by virtue of the copyrights to any *uncopy-*

righted musical composition, or to control the price at which any user of their copyrighted music may render the same in a public performance for profit, or as to how a user may avail himself of his license in the sphere to which the license relates. On the contrary the vice in the *Ethyl* case was the attempt to control the price at which gasoline could be retailed through the veto power which the Ethyl Company exercised over those to whom their licensees could sell. There is not even an intimation in this record that the Society or its members have attempted to fix or affect the price of sheet music, phonograph records, or any other commodity, nor does the price charged by the Society in any wise affect the prices charged by other licensors for the licensing of the right of public performance for profit. The purpose and effect of the formation of the Society is set out at length in our main brief. It is sufficient here to state that its licenses are open to all upon the same terms and no user has ever been refused a license by the Society nor has any one been discriminated against. The Society serves a useful purpose and the combination is a reasonable one within the doctrine laid down by this Court in *Appalachian Coals, Inc. v. United States*, 288 U. S. 344 (1933).

III. The invalidity of the State Statutes resulting from their encroachment upon the interstate commerce and copyright fields is made manifest by the recent consent decree entered in the Southern District of New York.

Defendants refer to a proceeding in equity brought by the United States against the American Society of Composers, Authors and Publishers in the Southern District of New York (E. 78-388) and state that this culminated on February 5, 1941 by the filing of a criminal information for violations of the Sherman Act in *United States v.*

American Society of Composers, Authors and Publishers
(E. D. Wisc. Crim. No. 4492).*

Defendants fail to state, however, that the equity suit in the Southern District of New York was voluntarily discontinued by the United States Government on March 4, 1941 (a copy of the order of discontinuance is annexed hereto as Appendix "A"); that in a suit thereupon instituted by the Government in which no evidence was taken and no findings were made, a consent decree was entered on March 4, 1941 (a copy of the consent decree is annexed hereto as Appendix "B").

As pointed out in our main brief, statutes have been passed in several states to regulate the licensing of performing rights in copyrighted musical compositions, all directed to the same general purpose, *i. e.*, preventing the Society from effectively protecting such performing rights of its members against infringement. These statutes vary in their respective provisions.** The National Government

* As a part of the negotiations for the entry of the consent decree (Appendix "B"), the proceeding in the Eastern District of Wisconsin was terminated by a consent judgment imposing certain fines upon a plea of *nolo contendere*, the court expressly stating that the adjudication of guilt was "for the purposes of this case only." Such a consent judgment is not *res adjudicata* in any other case under the provisions of Section 16 of Title 15, U. S. C., which reads in part as follows:

"§16. *Effect of criminal prosecution; evidence; limitations.* A final judgment or decree rendered in an criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken."

** The Florida 1937 Act and the Nebraska Act, Case # 312, are substantially the same.

has considered that the activities of the Society sufficiently affect interstate commerce as to justify proceedings against the Society under the Sherman Act. Likewise defendants' main contention in this case is based upon the assumption that the Society and the other plaintiffs have violated the Sherman Act. Plaintiffs' right to license performing rights is derived from the Copyright Act. From what has been said before, and what will presently be stated, it is manifest that to uphold the State Statutes would bring about an intolerable situation, in that there would thus result irreconcilable conflicts between the Copyright Act and the Federal Anti-Trust Acts as interpreted by the Department of Justice on the one hand and the State Statutes on the other.

The consent decree permits the Society to continue as heretofore, with the following exceptions:

(1) The composers, authors and publishers who are members of the Society, may agree upon issuing licenses independently of the Society, but if they do so, the Society may (a) require that all moneys derived from issuing licenses shall be paid to the Society; (b) require members to notify the Society before issuing licenses; (c) prohibit members from issuing exclusive licenses; (d) require the approval of the composer, author and publisher of a work before any license is given; and (e) prohibit members from granting licenses for re-licensing by any others, including Broadcast Music, Inc. (Art. II, Par. 1).

(2) The Society agrees not to discriminate between users similarly situated, in issuing licenses (Art. II, Par. 2).

(3) The Society agrees to offer licenses on a program basis of compensation if requested but it may, if the users so desire, issue licenses in the same manner as heretofore, provided there is no discrimination. (Art. II, Par. 3)

(4) If the Society issues a license to a network, the latter must pay for the right to re-broadcast over all affiliated

stations. This is known as "clearance at the source." (Art. II, Par. 4).

(5) If any manufacturer of electrical transcriptions desires a license for specific commercial performances over broadcasting stations, the Society agrees not to refuse to offer such a license (Art. II, Par. 5).

(6) If any user other than a radio broadcaster, desires a license for a specific musical composition, the Society will not refuse to offer such a license "at a price or prices to be fixed by said defendant [the Society] for the performance of such specific (i.e., per piece) musical compositions, the use of which shall be requested by the prospective licensee" (Art. II, Par. 6).

(7) If radio broadcasters desire a license for particular programs, the Society agrees that it will not refuse to offer a license on a performance or program basis "at a price or prices to be fixed by said defendant [the Society] for the performance of such programs, the use of which shall be requested by the prospective licensee" (Art. II, Par. 7).

(8) The Society agrees to limit the restrictions of its works, provided that nothing contained in the decree "shall prevent said defendant or its members from restricting performances of a musical composition in order reasonably to protect the work against indiscriminate performances or the value of the public performance for profit rights therein, or to protect dramatic performing rights therein, or as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition" (Art. II, Par. 8).

This provision recognizes the necessity of restricting works, in accordance with the findings of the court below (Finding "18", R. II, 1088-9).

(9) The Society agrees to elect members to the Board of Directors by weighted votes of its members (Art. II, Par. 9).

(10) The Society agrees to change Article XIV, Section 6 of its Articles of Association (R. I, 45-58) by eliminating the provision which permits the Society to take into consideration the length of time during which a composer, author or publisher has been a member of the Society (Art. II, Par. 10).

(11) The Society agrees to amend Article II, Section 1 of its Articles of Association (R. I, 45-51) by providing that composers and authors who have regularly published one work (instead of five works), shall be eligible to membership (Art. II, Par. 11).

The decree does not adjudicate any guilt on the part of the Society. It represents an agreement reached between the Society and the Government. In presenting this decree to the United States District Court for the Southern District of New York, Victor O. Waters, Esq., Special Assistant to the Attorney General, expressly recognized the necessity for the continuation of the Society's existence to furnish an expedient source from which to acquire performing rights and to offer the authors and composers an instrumentality through which they can police copyright infringements and have a collective bargaining agency. A copy of Mr. Waters' statement to the Court in presenting the decree is annexed hereto as APPENDIX "C".

If the Society continues as a collective bargaining agency for composers and authors and fixes prices in the manner not only permitted, but expressly required, by Article II, Paragraphs (6) and (7) of the consent decree, it will violate Section 1 of the 1937 Act, which prevents such collective bargaining by providing as follows:

1 "Section 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association; partnership, corporation or other group or entity, called herein a combination, when the mem-

bers therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and where one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself or its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; * * *

Section 2-A of the 1937 Act requires that the selling price of musical compositions be "so arrived at and determined for all uses and purposes." The words "so arrived at" obviously refer back to Section 1 which bars collective action.

Section 3 outlaws all existing contracts made by a combination declared unlawful under Section 1.

Under the consent decree, all such contracts are valid, but users having the Society's radio broadcasting license may request an additional option for payment on a so-called per program basis, in which event the Society must quote a price for such programs which will be on a blanket license basis. The consent decree provides (Art. II, Par. [3]):

"With respect to any existing or future performing license agreement with a radio broadcaster, defendant, American Society of Composers, Authors and Publishers, shall not, if required by such broadcaster, refuse to offer a per program basis of compensation on either or both of the following basis which may be specified by the broadcaster:

"(i) in respect of sustaining programs a per program license fee, expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which musical compositions licensed by said defendant shall be performed;

"(ii) in respect of commercial programs, a per program license fee, either expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which the musical compositions licensed by said defendant for performance shall be performed, or, at the option of defendant, the payment of a percentage of the revenue derived by the licensee for the use of its broadcasting facilities in connection with such program."

If the broadcaster does not request any such option, the existing contract is entirely lawful. Yet Section 3 of the 1937 Act makes it unlawful to attempt to enforce payment under any existing agreement and the remaining sections of the Statute permit the use of the Society's works, as the court below pointed out, "without pay."

The 1939 Act likewise condemns conduct which is lawful under the consent decree. Section 1 defines a "blanket license" as including "any device whereby public performance for profit is authorized of the combined copyrights of two or more persons" and the "blanket royalty or fee" as including "any device whereby prices for performing rights are not based on the separate performance of individual copyrights."

Section 4-A makes it unlawful for two or more copyright owners to associate for the purpose of granting blanket licenses unless each copyrighted work of each individual copyright owner shall be made available "to each user of such compositions within the state, at the option of the user . . . at a price established for each separate performance of each such composition." In order to permit each user to exercise this option, prices must be scheduled in advance for each user. The consent decree makes no such requirement. That decree does not give broadcasters the right to use compositions on a basis of each separate performance. The decree recognizes that such a system of licensing could not possibly work.

As to users other than radio broadcasters, the Society is required by the consent decree to quote a price for the use of specific compositions *only as to such compositions the use of which shall be specifically requested by such user.*

The consent decree provides (Art. II, Par. [6]):

“(6) Defendant, American Society of Composers, Authors and Publishers, shall not, in connection with any offer to license by it the public performance for profit of musical compositions by users other than broadcasters, refuse to offer a license *at a price or prices to be fixed by said defendant* for the performance of such specific (*i. e.*, per piece) musical compositions, the use of which shall be requested by the prospective licensee.”

This provision, as well as Article II, paragraph 7 of the consent decree *require* the Society to issue certain licenses “at a price or *prices to be fixed* by [it].” Yet such “fixing of prices” by the Society is made unlawful by the State Statutes!

Defendants claim that all the provisions of the 1939 Act were essential to prevent plaintiffs from restraining trade. Yet none of those provisions was incorporated in the consent decree which had no other purpose than to prevent any possible restraints of trade. How can the requirement that plaintiffs duplicate in the State of Florida all the information filed in the Copyright Office, as required by Section 2 of the 1939 Act, aid in preventing a restraint of trade? The consent decree does not require it, and yet the only claimed justification for this Statute is an alleged combination of publishers none of whom resides or does business in Florida. If there were any restraint, it would be restraint of *interstate* commerce and could only be regulated by the United States.

Defendants do not correctly state the requirements of Section 4-A of the 1939 Act. They state that Section 4-A "permitted combinations not large enough to fall under the ban of Section 1 of the 1937 Act to operate, provided the *proposed licensee* was given the option to take a license on a per piece basis from each of the individual copyright owners in the combination, at prices fixed by the individual owner" (Def. Br. p. 50). Section 4-A of the 1939 Act does not so provide. It makes it unlawful for any association of two or more copyright owners (whether restraining trade or not) to issue blanket licenses, even though such licenses may be voluntarily entered into between the association and the user, unless every composition of every member of the association is made available "*to each user of such compositions within the state*, at the option of the user" at prices fixed in a schedule filed in advance by each copyright owner acting individually.

Section 4-B which requires the filing of copies of all blanket licenses, can have no purpose except to enforce the provisions of Sections 4-A and 4-C which the court below held invalid.

Section 4-C, making it unlawful to issue licenses on any basis other than the program basis therein prescribed, prevents plaintiffs from issuing blanket licenses in conformity with Article II, Paragraph (3) of the consent decree, which permits licenses to be issued on any basis that may be agreed upon between the Society and users, provided there is no discrimination. This section of the 1939 Act cannot be regarded as a reasonable method of preventing restraints of trade in the State of Florida. The sole purpose of this section, as of all the other sections of both the 1937 Act and the 1939 Act, is to so burden the licensing of performing rights that such licensing will be abandoned by the plaintiffs.

If Section 2 of the 1939 Act, which requires a duplication of all information filed in the Copyright Office, is unconstitutional (and we submit that no justification for such duplication has been shown) *all* the remaining sections of the Statute must fall.

Defendants admit that the Statutes have only two purposes, one, to prevent restraints of trade, which purpose, we submit, is a feigned one; the *actual* purpose is the second purpose which the Statutes admittedly sought to accomplish, namely, "to allow users of copyrighted music for profit under certain specified conditions to use music without payment for it" (Def. Br. p. 36).

Some sections of the 1937 Act expressly stated such purpose in clear language. In the 1939 Act, the same purpose is apparent but the draftsman was careful not to state it in so many words. The 1939 Act accomplishes this purpose by making it so difficult to license the right of public performance for profit in the State of Florida, that plaintiffs will of necessity abandon all such licensing if the Act is upheld.

Defendants cite several cases where statutes were upheld, which prevented *actual* restraints of trade. Nowhere in the 1937 Act or in the 1939 Act are *actual* restraints of trade condemned. The conduct proscribed may be entirely lawful. It is clearly lawful under the Sherman Act because it has not been prohibited in a decree entered under that Act. The very fact that conduct which is lawful under the Sherman Act is made unlawful under the State Statutes, plus the fact that the Statutes create *presumptions* with respect to restraining trade, which do not have any basis in fact or in law, show clearly that the Statutes were not passed in the *bona fide* public interest or in pursuance of the police power of the State.

The sole purpose of both State Statutes was to nullify rights granted under the Federal Copyright Act.

Both Statutes should be held invalid in their entirety.

CONCLUSION.

The judgment of the court below, insofar as it holds the 1937 Act entirely invalid, should be affirmed; and insofar as it holds parts of the 1939 Act valid, it should be modified by declaring the entire 1939 Act invalid.

Respectfully submitted,

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April, 1941.

APPENDIX "A".

Order Discontinuing 1934 Suit Brought Against American
Society of Composers, Authors and Publishers.IN THE DISTRICT COURT OF THE
UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Petitioner,

v.

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants.In Equity
No. E 78-388

ORDER

This cause came on for hearing at this term, upon motion of the petitioner for leave to dismiss the suit, and after hearing counsel, it was ordered, adjudged and decreed that the petition be, and it hereby is, discontinued without prejudice.

Dated, March 3rd 1941

(sgd) HENRY W. GODDARD
HENRY W. GODDARD
United States District Judge.

Filed

The above order is consented to by the Petitioner and the undersigned attorneys for the defendants.

(sgd) VICTOR O. WATERS
Special Assistant to the
Attorney General

Attorneys for the Defendant American
Society of Composers, Authors and
Publishers.

(sgd) GENE BUCK,
President American Society
of Com., Au. & Pub.

(sgd) SCHWARTZ & FROHLICH,
Attys. for Am. Society
by LOUIS D. FROHLICH

APPENDIX "B".

Consent Decree, March 4, 1941.

IN THE DISTRICT COURT OF THE
UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

TERM, 1941

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS:
GENE BUCK, President;
GEORGE W. MEYER, Secretary;
and GUSTAVE SCHIRMER, Treasurer,
Defendants.

Civil Action
File No. 13-95

CIVIL DECREE

This cause came on to be heard on this 3rd day of March, 1941, the plaintiff being represented by Thurman Arnold, Assistant Attorney General, Victor O. Waters, Special Assistant to the Attorney General, and Warren Cunningham, Jr., Special Attorney, and the defendants being represented by their counsel, and having appeared and filed their answer to the complaint herein.

It appears to the Court that defendants herein have consented in writing to the making and entering of this decree, without any findings of fact, upon condition that neither such consent nor this decree shall be construed as an admission or adjudication that said defendants have violated any law.

It further appears to the Court that this decree will provide suitable relief concerning the matters alleged in the complaint filed herein and that by reason of the aforesaid consent of defendants and its acceptance by plaintiff it is unnecessary to proceed with the trial of the action, or to take testimony therein, or that any adjudication be made of the facts.

Now, THEREFORE, Upon motion of plaintiff, and in accordance with said consent, it is hereby

ORDERED, ADJUDGED AND DECREED

I. The Court has jurisdiction of the subject-matter set forth in the complaint and of the parties hereto with full power and authority to enter this decree and the complaint states a cause of action against the defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and the acts amendatory thereof and supplemental thereto.

II. Defendants, Gene Buck, as President of the American Society of Composers, Authors and Publishers; George W. Meyer, Secretary; Gustave Schirmer, Treasurer; and American Society of Composers, Authors, and Publishers, its officers, directors, agents, servants, employees, members, and all persons acting or claiming to act on its behalf are hereby perpetually enjoined and restrained from entering into or carrying out, directly or indirectly, any combination or conspiracy to restrain interstate trade and commerce, as alleged in the complaint, by doing, performing, agreeing upon, entering upon or carrying out any of the acts or things hereinafter in this paragraph II prohibited.

(1) Defendant, American Society of Composers, Authors and Publishers, shall not, with respect to any musical composition, acquire or assert any exclusive performing right

as agent, trustee or otherwise on behalf of any copyright owner, its members, or other owner of the performing right, or pursuant to any understanding or agreement with such owner, or its members, to pay for such right a share of, or an amount measured by, the receipts or revenues of said defendants. Nothing herein contained shall be construed as preventing defendant, American Society of Composers, Authors and Publishers, from regulating the activities of its members in the following respects: (a) By requiring all moneys derived from the issuance of licenses by the respective members of defendant to be paid by the licensee to defendant and distributed in the same manner as other revenues; (b) by requiring of its members that notice be given the defendant of their intent to issue licenses before the issuance of same; (c) by prohibiting the members from issuing exclusive licenses to commercial users of music; (d) by requiring, as a condition precedent to the issuance of a license by an individual member of the Society, the approval and consent, to be obtained by the licensor, of the composer(s), author(s) and publisher subject to such reasonable regulations as may be adopted by the composer(s), author(s) and publisher for that purpose; (e) by prohibiting the members from granting or assigning to persons, firms, corporations or enterprises, including Broadcast Music, Inc., the right to license or assign to others the right to perform publicly for profit the respective copyrighted musical compositions of which performance rights are owned or controlled by the respective members of the defendant Society.

(2) Defendant, American Society of Composers, Authors and Publishers, shall not enter into, recognize as valid or perform any performing license agreement which shall result in discriminating in price or terms between licensees similarly situated; provided, however, that differentials based upon applicable business factors which justify different prices or terms shall not be considered discriminations within the meaning of this sub-paragraph; and pro-

vided further that nothing contained in this sub-paragraph shall prevent price changes from time to time by reason of changing conditions affecting the market for or marketability of performing rights.

(3) Defendant, American Society of Composers, Authors and Publishers, shall not require, as a condition to any offer to license the public performance for profit of a musical composition or compositions for radio broadcasting, a license fee of which any part shall be (a) in respect of commercial programs, based upon a percentage of the income received by the broadcaster from programs in which no musical composition or compositions licensed by said defendant for performance shall be performed, or (b) in respect of sustaining programs, an amount which does not vary in proportion either to actual performances, during the term of the license, of the musical compositions licensed by said defendant for performance, or to the number of programs on which such compositions or any of them shall be performed; provided, however, that nothing herein contained shall prevent said defendant from licensing a radio broadcaster, on either or both of the foregoing basis, if desired by such broadcaster, or upon any other basis desired by such broadcaster.

With respect to any existing or future performing license agreement with a radio broadcaster, defendant, American Society of Composers, Authors and Publishers, shall not, if required by such broadcaster, refuse to offer a per program basis of compensation on either or both of the following basis which may be specified by the broadcaster:

- (i) in respect of sustaining programs a per program license fee, expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which musical compositions licensed by said defendant shall be performed;
- (ii) in respect of commercial programs, a per program license fee, either expressed in terms of dollars,

requiring the payment of a stipulated amount for each program in which the musical compositions licensed by said defendant for performance shall be performed, or, at the option of defendant, the payment of a percentage of the revenue derived by the licensee for the use of its broadcasting facilities in connection with such program.

In the event that defendant shall offer to license the public performance for profit of a musical composition or compositions for radio broadcasting upon either or both of the foregoing per program basis, and shall also offer to license such performance on a basis of compensation which shall not vary in direct proportion either to actual performances during the term of the licenses of the musical compositions licensed by said defendant for performance or to the number of programs on which musical compositions licensed by defendant shall be performed, defendant shall act in good faith so that there shall be a relationship between such per program basis and such other basis, justifiable by applicable business factors, including availability, so that there will be no frustration of the purpose of this sub-paragraph to afford radio broadcasters alternative basis of license compensation.

(4) Defendant, American Society of Composers, Authors and Publishers, shall not license the public performance for profit of any musical composition or compositions except on a basis whereby, in so far as network radio broadcasting is concerned, the issuance of a single license, authorizing and fixing a single license fee for such performance by network radio broadcasting, shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate licenses for such several stations for such performance.

(5) With respect to any musical composition in defendant's catalogue of musical compositions licensed for radio broadcasting and which is or shall be lawfully recorded for performance on specified commercially sponsored programs on an electrical transcription or on other specially prepared recordation intended for broadcasting purposes, said defendant shall not refuse to offer to license the public performance for profit by designated radio broadcasting stations of such compositions by a single license to any manufacturer, producer or distributor of such transcription or recordation or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made who may request such license, which single license shall authorize the broadcasting of the recorded composition by means of such transcription or recordation by all radio stations enumerated by the licensee, on terms and conditions fixed by said defendant, without requiring separate licenses for such enumerated stations.

(6) Defendant, American Society of Composers, Authors and Publishers, shall not, in connection with any offer to license by it the public performance for profit of musical compositions by users other than broadcasters, refuse to offer a license at a price or prices to be fixed by said defendant for the performance of such specific (i. e., per piece) musical compositions, the use of which shall be requested by the prospective licensee.

(7) Defendant, American Society of Composers, Authors and Publishers, shall not, in connection with any offer to license by it the public performance for profit of musical compositions by radio broadcasters, refuse to offer a license on a per performance or per program basis as provided for in paragraph II (3) hereof at a price or prices to be fixed by said defendant for the performance of such programs, the use of which shall be requested by the prospective licensee.

(8) Defendant, American Society of Composers, Authors and Publishers, shall not assert or exercise any right or power nor shall any of its members exercise any right or power to restrict from public performance for profit by any licensee of said defendant any copyrighted musical composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; provided, however, that nothing in this sub-paragraph shall prevent said defendant or its members from restricting performances of a musical composition in order reasonably to protect the work against indiscriminate performances or the value of the public performance for profit rights therein or to protect the dramatic performing rights therein, or, as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

(9) The Society shall not elect the members of the Board of Directors in any manner other than by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within the Society in determining the number of votes each member may cast for the election of directors. Upon the expiration of the terms of office of the present directors, the provisions of this section shall apply to the election of their successors. Thereafter, not less than one-twelfth of the total membership of the Board of Directors shall be elected annually.

(10) Defendant, American Society of Composers, Authors and Publishers, shall provide in its by-laws that the Society shall not distribute to its members the moneys received by granting the right to perform copyrighted musical compositions publicly for profit on any basis other than the number, nature, character and prestige of the copyrighted

musical compositions composed, written or published by each member, the length of time in which the works of the member have been a part of the catalog of the Society, and popularity and vogue of such works, all to be determined in a fair and non-discriminatory manner.

(11) Defendant, American Society of Composers, Authors and Publishers, shall not require as a condition precedent to eligibility for author or composer membership in the Society the regular publication of more than one musical composition or writing by any person who regularly practices the profession of writing music and the text or lyrics of musical works.

III. The terms of this decree shall be binding upon, and shall extend to each and every one of the successors in interest of defendant, American Society of Composers, Authors and Publishers, and to any and all corporations, partnerships, associations and individuals who or which may acquire the ownership or control, directly or indirectly, of all or substantially all of the property, business and assets of defendant, American Society of Composers, Authors and Publishers, whether by purchase, merger, consolidation, re-organization or otherwise. None of the restraints or requirements herein imposed upon the defendant shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories and possessions.

IV. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or an Assistant Attorney General and on reasonable notice to defendant, American Society of Composers, Authors and Publishers, made to the principal office of said defendant, be permitted

(a) reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this decree; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, and subject to any legally recognized privilege, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this decree; provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

V. This decree shall become effective ninety (90) days after the entry hereof, except that the provisions of subparagraph (6) of paragraph II shall become effective nine (9) months after the effective date of the other provisions of this decree.

VI. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to make application to the Court any time after the effective date hereof for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this decree, for the modification hereof upon any ground for the enforcement of compliance herewith and the punishment of violations hereof. Jurisdiction of this cause is retained for the purpose of granting or

denying such applications so made as justice may require and the right of the defendant to make such application and to obtain such relief is expressly granted.

Approved

HENRY W. GODDARD
United States District Judge.

We hereby consent to the entry of the foregoing decree.

For the complainant:

THURMAN ARNOLD
Assistant Attorney General

VICTOR O. WATERS
Special Assistant to the Attorney General.

WARREN CUNNINGHAM
Special Attorney

For the Defendants:

CHARLES POLETTI

MILTON DIAMOND

SCHWARTZ & FROHLICH

By HERMAN FINKELSTEIN
Member of the Firm

Judgment Rendered
March 4, 1941

GEORGE J. H. FOLLMER
Clerk

APPENDIX "C".

Statement of Victor O. Waters, Esq., Special Assistant to the Attorney General, in presenting the consent decree (Appendix "B" hereof) to the United States District Court.

(United States v. American Society of Composers, Authors and Publishers, et al., Civil Action No. 13-95, S. D. N. Y., March 3, 1941).

"Before speaking briefly of the terms of the proposed decree, I would like to state that throughout these proceedings the government has recognized that there was a necessity for some type of organization such as Ascap, that it was necessary to furnish an expedient source from which to acquire performance rights, because of the nature of music, that it was necessary in order to afford authors and composers an instrumentality through which they can police copyright infringements, and that it was necessary to act as the collective bargaining agency of authors and composers.

"The position of the government has been that the organization of Ascap and the activities of the Society in the issuance of licenses have gone further than was necessary to carry out its legitimate objectives which are recognized by the government.

"The proposed decree in this case I think recognizes the necessity for the existence of Ascap and at the same time eliminates those activities and practices which the department has heretofore deemed as violative of the Sherman Act.

"The restrictive provisions of the decree are in paragraph 2, page 2, if your Honor has a copy before you.

"The Court: No, I haven't.

"(Mr. Waters hands copy to the Court.)

"Mr. Waters: The first sub-paragraph of paragraph 2 prohibits the Society from entering into or asserting any exclusive performing right as agent, trustee or otherwise on behalf of any copyright-owner. That provision is intended to restore competition between the respective members of the organization and the organization itself. However, it is conceded, in entering into the terms of this decree, that in the event the rights were non-exclusive with no power of regulation, without reasonable regulation being permitted, that a non-exclusive arrangement would in essence destroy the organization, which was not the intent of the Department at all.

"There are five provisos as to the non-exclusive provisions. They are not mandatory on the part of the Society to exercise, but in the event that they are exercised by this organization, they shall not be construed as violations of the decree. The first proviso provides that nothing herein contained shall prevent the members from paying money derived from the issuance of licenses independent of the Society to the Society.

"(b) of the provisos states that before the issuance of licenses by the respective members, notice shall be given to the Society of their intent to do so, in order that the organization might carry on its policing activities and know who is licensed and who is not licensed, and therefore be in a position to know who is violating the Copyright Law.

"(c) prohibits the members from issuing exclusive licenses to commercial users.

"Proviso (d) by requiring, as a condition precedent to the issuance of a license by an individual member, the approval and consent, to be obtained by the licensor; to require the consent of the author, composer or publisher involved.

"Proviso (e) prohibits the members from granting licenses for relicensing by others, specifically namely Broadcast Music, Inc.

"It is not the intent of the Department to create a chaotic situation whereby another competing organization might come in and acquire performance rights by its members and therefore create another monopoly which might be more potentially vicious than the one involved in this litigation.

"Sub-paragraph 2 prohibits the Society from discriminating between users of music similarly situated.

"Sub-paragraph 3, although quite lengthy, briefly provides for a per program system of licensing for radio broadcasts, a system of licensing that many broadcasters have desired for several years.

"Sub-paragraph 4 provides for what is commonly known in the industry as clearance at the source. That is, the Society shall issue only one license with respect to network broadcasting operations which will authorize the performance by all of the radio broadcasting stations affiliated within any particular network system.

"Sub-paragraph 5 provides for what is commonly known in the industry as clearance at the source for electrical transcription. That is, an advertiser, utilizing the facilities of mechanical devices, might go to the Society and acquire a license authorizing performance by such radio broadcasting stations as is designated by the prospective licensee.

"Sub-paragraph 6 provides for a per piece system of licensing in the event that a user expresses a desire for such per piece system. That is directed at what is commonly known as the all or none policy in licensing. A user might go to the Society and acquire the right to perform whatever music he desires.

"Sub-paragraph 7 is what you might term a partial repetition of sub-paragraph 3 in that with respect to radio broadcasts the Society shall not refuse to issue a license as provided in sub-paragraph 3.

"Sub-paragraph 8 briefly provides that the Society, nor shall any of its members exercise any right or power to

restrict the musical compositions in its catalog of music for the purpose of permitting the fixing or regulating of fees for the recording rights.

"Sub-paragraph 9 is directed toward what is commonly known as a perpetuating board of directors of the Society. It provides briefly that the members of the board of directors shall be elected by membership vote of the organization.

"Sub-paragraph 10 relates to the manner in which the moneys collected by the Society are to be distributed to the various members. It dispenses with the present practice of the organization of considering the length of time of the services rendered by the various members of the Society in determining how the money shall be distributed.

"Sub-paragraph 11 drops the membership requirements from the publication of five tunes, making an author who has regularly published one musical composition eligible for membership.

"The remaining portions of the proposed decree relate to formal matters.

"Paragraph III provides that the terms of the decree will be binding upon the successors of the organization.

"Paragraph IV provides for reasonable access by the Department of Justice to all records on notice to the Society in order to enforce compliance with the decree.

"Paragraph V relates to the effective date of the decree, to become effective 90 days after the entry, with the exception of sub-paragraph (6) which relates to per piece licensing, which is to become effective nine months after the other provisions of the decree.

"Paragraph VI relates to the Court's retaining jurisdiction in order to afford either party such relief as the Court in the future may deem just and proper."

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